



# Co-operatives Act 1996

## Directors duties and liabilities

### Directors duties

Directors' duties are comprehensive under the Co-operatives Act, giving the common law duties statutory force. All directors (and other officers) must:

- ♦ act **HONESTLY** in the exercise of powers and discharge of their duties - this covers activities such as fraud (section 221);
- ♦ use a **STANDARD of CARE of a REASONABLE PERSON** in a like position in a co-operative - this covers negligence or carelessness. It is likely to be a standard of care lower than that demanded of the director of a public company, and allows for differences between co-operatives. As a general rule the more responsibility involved, the greater the standard of care required (s.222);
- ♦ not **USE INFORMATION/POSITION IMPROPERLY** to gain advantage or cause detriment to the co-operative (also applicable to former officers) - this covers actions by directors which are not for the benefit of the co-operative (s.223).

For example, where a director has knowledge of the price of a commodity before the members of the co-operative are informed and sells or purchases that commodity to the advantage of the director or an associate.

### Declaration of interests

Any director who is, or becomes, interested in contracts with the co-operative, must declare their nature and extent to the Board. These declarations must be minuted. Once the declaration has been made, that director cannot be present at any deliberation, or take part in any determination, in relation to that contract or dealing (s.234).

Given that co-operatives are designed to give benefits to their members, and that directors must also be members, there are a number of interests which a director does not need to declare (s.237).

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INFORMATION





## Co-operative Federation of Victoria Ltd

These are:

- any contract for the purchase of goods and services from the co-operative;
- any lease of land by the co-operative;
- any contract for the sale of agricultural products or livestock to the co-operative;
- any contract which, under the rules, may be made with the co-operative; and
- any contract of a class prescribed by the regulator in regulations made under the Act,

if it is made with the director as the other party.

The only condition is that the terms be agreed in good faith and in the ordinary course of the business of the co-operative. The terms must not be other than are usual and proper in similar dealings between the co-operative and its members.

If the primary activity of the co-operative is, or includes, the buying of land to settle or retain people on the land and provide community services or benefits, any director of that co-operative is precluded from selling land to the co-operative (s.232).

### Remuneration

No director is allowed to receive remuneration other than fees and concessional benefits approved at a general meeting of members. A restriction also extends to financial accommodation (ie. loans) without the prior approval of the Board or a resolution passed at a general meeting, unless the terms are the same as would be provided at arms' length in the same circumstances.

Special requirements apply to these meetings (see section 231). For example, the approval of a single transaction requires a meeting of the directors, at which at least 50% are present, to vote two thirds in favour. In the case of a scheme, or multiple transactions, members must be given full details of the scheme at least 21 days before the meeting and pass a resolution in favour at the meeting.

### Indemnification

A co-operative is not able to exempt its directors from liability. Any attempt to do this is void. This excludes insurance policies and indemnification after the director is acquitted by a court or found to have acted negligently but honestly and reasonably in the circumstances. If there is a failure to maintain the required standard of care, the co-operative can vote, by ordinary resolution, to forgive the director's breach (s.227).

### **Trading while insolvent**

As part of the application for registration of new co-operatives, directors are required to declare that, in their opinion, the co-operative will be able to pay its debts as they fall due (see section 24). This picks up the wording of the Corporations Law, adopted by the Act, which prohibits a co-operative from trading whilst insolvent.

This is a complex area and can lead, in some circumstances, to personal liability for directors. If your co-operative is struggling financially, it is advisable to obtain professional advice at an early stage.

### **Miscellaneous**

This list is not exhaustive, but provides an overview:

- ♦ The Board has all the powers of a natural person, excluding the instances in the Act where a decision must be made by general meeting (see section 211).
- ♦ In order to be qualified as a director, a person must be a member or an employee or a person qualified as provided by the rules (independent) director. There must be 3 member directors for each "independent" director. The person must not have a conflict of interest (ie, hold another position such as auditor) or have any convictions.
- ♦ The directors must meet at least quarterly, and a quorum is 50%. The directors are able to delegate and form a committee (see section 218).
- ♦ The directors are appointed according to the Rules which may incorporate special requirements pertinent to the particular co-operative.

### **Possible penalties**

If a director breaches any of the above, penalties may apply. A court may order compensation on conviction of the director, or the co-operative can recover damages, or sue the director personally in civil proceedings.

These include fines and imprisonment. They range from \$2,000 to \$24,000, or imprisonment for 2 years. We recommend that any director obtain advice from a legal adviser if there is something about which he/she is not certain. □